United Development Company Sdn Bhd v The State Government of Sabah & Anor

HIGH COURT (KOTA KINABALU) — SUIT NO K21–16 OF 2008
ABDUL RAHMAN SEBLI JC
25 MARCH 2010

Constitutional Law — Fundamental liberties — Right to property — Acquisition of land by State Government — Compulsory acquisition — Whether ultra vires s 3 of the Land Acquisition Ordinance (Cap 69) (Sabah) and/or art 13 of the Federal Constitution — Whether plaintiff still owner of land — Land Acquisition Ordinance (Cap 69) (Sabah), ss 3(2), 6(2), 7(1),(3) — Federal Constitution art 13

Land Law — Acquisition of land — Compulsory acquisition — Land not developed for purposes acquired — Lapse of 31 years since acquisition — Request for return of land — Land acquired for specific public purposes — Whether acquirer could deal with land in any manner deemed fit post acquisition — Whether State Government acted mala fide by not putting land to use for purpose it was acquired — Whether ultra vires s 3 of the Land Acquisition Ordinance (Cap 69) (Sabah) and/or art 13 of the Federal Constitution — Whether plaintiff still owner of land — Land Acquisition Ordinance (Cap 69) (Sabah) ss 3(2), 6(2), 7(1),(3) — Federal Constitution art 13

The plaintiff was at the material time the registered owner of a piece of land situated in Sabah. Sometime in 1979, the first defendant acquired the said land purportedly for the purpose of developing a project known as 'Skim Penempatan Semula' thereon and the compensation price for the said land was fixed at RM1m although the plaintiff had asked for RM1.5m. The acquisition was notified in the *Gazette* seventeen years later by way of *Gazette* Notification No 708 dated 19 December 1996 and repeated on 26 December 1996. The plaintiff had, vide a letter dated 21 March 2001, requested for the return of the said land for a consideration sum of RM1m on the ground that it was still not developed despite a lapse of 31 years since the acquisition in 1979. On 21 June 2004, the second defendant sent a report to the *Setiausaha Hasil Bumi* on the proposed development of the said land. Apparently the State Government had only then identified the said land as the site for 'Taman Kekal Pengeluaran Makanan'. The plaintiff was then duly informed of the State Government's refusal to return the land to the plaintiff. The plaintiff commenced this action seeking, inter alia, the following reliefs; (a) a declaration that the purported purchase of the said land by a private treaty was ultra vires s 6(2) of the Land

Acquisition Ordinance (LAO) and was thus null and void and that therefore the plaintiff was entitled to take repossession of the said land by paying or refunding to the first defendant the sum of RM1m without interest; and (b) a declaration that the defendants' purported acquisition of the said land was mala fide and/or ultra vires ss 3 and/or 7 of the LAO or art 13 of the Federal Constitution and thus at all material times the said land was still the plaintiff's lawful property. The following issues required determination: (a) whether the compulsory acquisition of the said land was ultra vires s 3 of the LAO and/or art 13 of the Federal Constitution; (b) whether the defendants by acquiring the said land had acted mala fide by not putting to use the said land for the specified purpose it was acquired; (c) whether the plaintiff was still the owner of the said land and if not, whether the plaintiff was entitled to take possession of the said land by paying or refunding to the defendants the sum of RM1m without interest; and (d) in that event, whether the defendants were liable to pay the plaintiff further compensation and/or damages.

Held, allowing the plaintiff's claim with costs:

(1) In the present case, the conditions of sale and acquisition of the said land had not been approved by the Yang di-Pertua Negeri when the acquisition was gazetted on 19 December 1996 and 26 December 1996. Subsection 6(2) of the LAO is clear and unambiguous. It means what it says. Thus, in the absence of approval by the Yang di-Pertua Negeri of the conditions of sale and acquisition, no concluded agreement had in fact been reached between the plaintiff and the State Government in respect of the said land. The State Government had no discretion to bypass this statutory requirement and there was no contrary intention manifested by sub-s 6(2) of the LAO. Therefore, the State Government's failure to comply with the statutory requirement renders the agreement void for illegality (see paras 13–15).

(2) The undue, inordinate and unexplained delay of 17 years by the State Government to *gazette* the acquisition speaks volumes of its real intention in acquiring the said land. Under sub-s 3(2) of the LAO it was mandatory for the defendants to publish in two issues of the *Gazette* and to serve on the plaintiff copies of the declaration. In addition to that, the defendants were required to issue the notice of acquisition under sub-s 7(1) read with sub-s 7(3) of the LAO. Neither of these had been done. Since the acquisition of the said land was not done in accordance with the LAO, it contravened art 13(1) of the Federal Constitution. Consequently, the acquisition of the said land in 1979 was unlawful (see paras 18 & 21).

(3) The State Government's failure to implement the 'Skim Penempatan Semula di Kawang, Daerah Papar' until today was evidence of mala fide on its part. It was clear that the State Government had no intention to put the said land to use for the purpose it was acquired in 1979. The spirit of

the LAO is to allow the State Government to acquire lands for specific public purposes. It does not give the State Government carte blanche to deal with the acquired lands in any manner it deems fit post acquisition (see paras 25 & 29).

(4) There was nothing in the LAO to confer on the State Government an unfettered discretion to deal with the land in any way it liked after acquisition. This in fact would be contrary to sub-s 3(2)(d) of the LAO which makes it mandatory for the State Government to specify in the declaration the purpose of the acquisition. To allow the government to change the land use at its whim after the acquisition, even for a public purpose is not only illegal but unjust to the landowner because when he negotiated for compensation it was on the understanding that his land was to be used for a particular public purpose, not any public purpose (see paras 30–31).

(5) The wide powers of the government to compel private individuals to give up their lands, albeit with compensation must not only be exercised in good faith but must manifestly be seen to be exercised in good faith. Landowners must be protected against compulsory deprivation of their properties for some oblique motive disguised as 'public purpose'. The possibility of this happening cannot be discounted as the State Government in the present case in fact tried to alienate the said land to a third party in 1996 as can be seen from the document at p 2 of encl 47 (see para 31).

(6) Having regard to the finding of the first and second issues above, the obvious answer to the third issue was in the affirmative because if the acquisition was unlawful for contravening art 13(1) of the Federal Constitution, the said land had not legally passed hands to the State Government. The acquisition being void and of no effect, the plaintiff was still the legal owner of the said land, notwithstanding the fact that the title deed to the land had been surrendered to the defendants (see para 33).

[Bahasa Malaysia summary

Plaintif pada masa matan merupakan pemilik berdaftar sebidang tanah yang terletak di Sabah. Sekitar tahun 1979, defendan pertama telah memperoleh tanah tersebut bagi tujuan memajukan projek dikenali sebagai Skim Penempatan Semula dan harga pampasan untuk tanah tersebut telah ditetapkan pada RM1 juta meskipun plaintif telah meminta untuk RM1.5 juta. Pemerolehan itu telah dimaklumkan dalam Warta 17 tahun kemudian melalui Pemberitahuan Warta No 708 bertarikh 19 Disember 1996 dan diulangi pada 26 Disember 1996. Plaintif telah, melalui surat bertarikh 21 Mac 2001, meminta pengembalian tanah tersebut untuk jumlah balasan RM1 juta atas alasan bahawa ia masih belum dimajukan meskipun 31 tahun telah

berlalu sejak pemerolehan pada tahun 1979. Pada 21 Jun 2004, defendan kedua telah menghantar laporan kepada Setiausaha Hasil Bumi berhubung cadangan pembangunan tanah tersebut. Adalah jelas kerajaan negeri hanya pada saat itu telah mengenalpasti tanah tersebut sebagai tapak 'Taman Kekal Pengeluaran Makanan'. Plaintif kemudian telah diberitahu tentang keengganan kerajaan negeri untuk memulangkan tanah tersebut kepada plaintif. Plaintif telah memulakan tindakan ini memohon, antara lain, relief-relief berikut: (a) satu deklarasi bahawa belian tanah dikatakan melalui perjanjian persendirian adalah ultra vires s 6(2) Ordinan Pemerolehan Tanah ('OPT') dan oleh itu adalah terbatal dan tidak sah dan bahawa dengan itu plaintif berhak membuat pemerolehan semula ke atas tanah tersebut dengan membayar atau membayar balik kepada defendan pertama jumlah RM1 juta tanpa faedah; dan (b) satu deklarasi bahawa pemerolehan defendan ke atas tanah dikatakan itu adalah mala fide dan/atau ultra vires ss 3 dan/atau OPT atau perkara 13 Perlembagaan Persekutuan dan oleh itu pada setipa masa matan tanah tersebut masih hartanah plaintif yang sah. Isu-isu berikut perlu ditentukan: (a) sama ada pemerolehan wajib ke atas tanah tersebut adalah ultra vires s 3 OPT dan/atau perkara 13 Perlembagaan Persekutuan; (b) sama ada defendan-defendan dengan memperoleh tanah tersebut telah bertindak mala fide dengan tidak menggunakan tanah tersebut bagi tujuan khusus ia diperoleh; (c) sama ada plaintif masih pemilik tanah tersebut dan jika tidak sama ada plaintif berhak mengambil pemerolehan tanah tersebut dengan membayar atau membayar balik kepada defendan-defendan sejumlah RM1 juta tanpa faedah; dan (d) jika keadaan begitu, sama ada defendan-defendan bertanggungjawab untuk membayar plaintif pampasan dan/atau ganti rugi selanjutnya.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Dalam kes ini, syarat-syarat jualan dan pemerolehan tanah tersebut tidak diluluskan oleh Yang di-Pertua Negeri apabila pemerolehan itu diwartakan pada 19 Disember 1996 dan 26 Disember 1996. Subseksyen 6(2) OPT adalah jelas dan tak taksa. Ia menyatakan apa yang dimaksudkannya. Oleh itu, ketiadaan kelulusan Yang di-Pertua Negeri berhubung syarat-syarat jualan dan pemerolehan, tiada persetujuan tercapai antara plaintif dan kerajaan negeri berkaitan tanah tersebut. Kerajaan negeri tiada budi bicara untuk melangkau keperluan statutori ini dan tiada niat bercanggah yang ditunjukkan dengan jelas oleh sub-s 6(2) OPT. Oleh itu, kegagalan kerajaan negeri untuk mematuhi keperluan statutori menyebabkan perjanjian itu tidak sah kerana kepenyalahan undang-undang (lihat perenggan13–15).

(2) Kelewatan tidak berpatutan, melampau dan tidak dijelaskan selama 17 tahun oleh kerajaan negeri untuk mewartakan pemerolehan itu dengan nyata menunjukkan niat sebenarnya memperoleh tanah tersebut. Di bawah sub-s 3(2) OPT ia adalah mandatori untuk defendan-defendan

menerbitkan dua isu Warta dan menyampaikan ke atas plaintif salinan deklarasi itu. Tambahan lagi, defendan-defendan dikehendaki mengeluarkan notis pemerolehan di bawah sub-s 7(1) dibaca bersama sub-s 7(3) OPT. Tiada satupun telah dilakukan. Oleh kerana pemerolehan tanah tersebut tidak dilakukan menurut OPT, ia melanggar perkara 13(1) Perlembagaan Persekutuan. Akibat itu, pemerolehan tanah tersebut dalam tahun 1979 adalah menyalahi undang-undang (lihat perenggan 18 & 21).

(3) Kegagalan kerajaan negeri untuk melaksanakan Skim Penempatan Semula di Kawang, Daerah Papar sehingga hari ini menjadi bukti mala fide di pihaknya. Adalah jelas bahawa kerajaan negeri tiada niat untuk meletakkan tanah tersebut untuk digunakan bagi tujuan ia diperoleh dalam tahun 1979. Niat OPT adalah untuk membenarkan kerajaan negeri memperoleh tanah-tanah untuk tujuan awam yang spesifik. Ia tidak memberi kerajaan negeri carte blanche untuk berurusan dengan tanah-tanah yang diperoleh dalam apa carapun yang difikirkannya sesuai selepas pemerolehan (lihat perenggan 25 & 29).

(4) Tiada apa-apa dalam OPT untuk memberikan kerajaan negeri budi bicara yang luas untuk berurusan dengan tanah dalam apa cara ia suka selepas pemerolehan. Bahkan ini adalah bertentangan dengan sub-s 3(2)(d) OPT yang menjadinya mandatori untuk kerajaan negeri menetapkan dalam deklarasi tujuan pemerolehan itu. Dengan membenarkan kerajaan menukar penggunaan tanah sesuka hati selepas pemerolehan, meskipun untuk tujuan awam bukan sahaja menyalahi undang-undang tetapi tidak adil kepada pemilik tanah kerana apabila dia berunding tentang pampasan adalah difahamkan bahawa tanahnya akan digunakan untuk tujuan awam tertentu, dan bukan untuk apa-apa tujuan awam (lihat perenggan 30–31).

(5) Kuasa meluas kerajaan memaksa individu-individu persendirian untuk melepaskan tanah mereka, meskipun dengan pampasan bukan sahaja patut dilaksanakan dengan niat baik tetapi patut jelas dilihat telah dilaksanakan dengan niat baik. Pemilik-pemilik tanah patut dilindungi daripada perampasan wajib hartanah-hartanah mereka untuk motif serong yang disamar sebagai 'tujuan awam'. Kemungkinan ini berlaku tidak boleh diambilkira kerana kerajaan negeri dalam kes ini telah cuba memperoleh tanah tersebut kepada pihak ketiga dalam tahun 1996 sepertimana yang dilihat dalam dokumen di ms 2 lampiran 47 (lihat perenggan 31).

(6) Berdasarkan penemuan isu-isu pertama dan kedua di atas, jawapan yang nyata untuk isu ketiga adalah positif kerana jika pemerolehan itu menyalahi undang-undang kerana bertentangan dengan perkara 13(1) Perlembagaan Persekutuan, tanah tersebut tidak bertukar tangan secara sah kepada kerajaan negeri. Oleh kerana pemerolehan itu tidak sah dan

tidak berkesan, plaintif masih pemilik sah tanah tersebut, meskipun pada hakikatnya hak milik surat ikatan tanah itu telah diserahkan kepada defendan-defendan (lihat perenggan 33).]

Notes

For cases on compulsory acquisition, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1974–1975.

For cases on fundamental liberties in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2043–2226.

Cases referred to

Hong Lee Trading & Construction Sdn Bhd v Taut Ying Realty Sdn Bhd [1991] 1 MLJ 250, HC (refd)

Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81; [1999] 2 CLJ 997, FC (refd)

Pemungut Hasil Tanah Daerah Barat Daya, Penang v Kam Gin Paik & Ors [1986] 1 MLJ 362, PC (folld)

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 1 MLJ 35, FC (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan (in this case the appellant in the appeal was the land executive committee, and not, as stated in the appeal record, the Pengarah Tanah dan Galian however, the parties made nothing of this, presumably because the government agree that whoever is cited as appellant the government will be bound if the appellant loses — mng ed mlj) v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204, FC (refd)

Simpsons Motor Sales (London) Ltd v Hendon Corporation (No 1) [1963] Ch 57, CA (refd)

Singapore Woodcraft Manufacturing Co (Pte) Ltd v Mok Ah Sai [1979] 2 MLJ 166, HC (refd)

Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v The Government of the State of Johore [1979] 1 MLJ 49, PC (refd)

Legislation referred to

Companies Act 1965

Contracts Act 1950 s 2(g)

Federal Constitution art 13, 13(1)

Government Contracts Act 1949 s 3(1)

Land Acquisition Act 1960 s 8(1)

Land Acquisition Ordinance ss 2, 3, 3(1), (2), (2)(d), (3), (5), 6(2), 7, 7(1), (3), 62(2)

A

Yunof Maringking (Trevor Maringking with him) (Maringking & Co) for the plaintiff.
Nor Asiah Mohd Yusof (State Counsel, State Attorney General's Chambers) for the defendants.

B

Abdul Rahman Sebli JC:

THE AGREED FACTS

C **[1]** The plaintiff is a company incorporated under the Companies Act 1965 and was at the material time the registered owner of a piece of land consisting of an area of 1400 acres more or less held under provisional lease No 1312 ('the said land') situated at Kawang in the District of Papar, Sabah.

D **[2]** Sometime in 1979 the first defendant ('the State Government') acquired the said land purportedly for the purpose of developing a project known as 'Skim Penempatan Semula' thereon. Pursuant to negotiations under sub-s 62(2) of the Land Acquisition Ordinance ('the LAO') between the plaintiff and the State Government the compensation price for the said land E was fixed at RM1m. The plaintiff had asked for RM1.5m.

[3] The plaintiff could not surrender the original title deed of the said land as it was misplaced. To effect payment of the RM1m compensation the plaintiff executed a memorandum of surrender of title dated 17 October 1979. The sum F was paid to the plaintiff on 10 October 1979 and there was no further negotiation between the parties thereafter.

[4] The acquisition was notified in the *Gazette* seventeen years later by way of G *Gazette* Notification No 708 dated 19 December 1996 and repeated on 26 December 1996. The second notification was necessary in order to cancel the title deed of the said land. The purpose of the acquisition, as declared in the *Gazette* notification, was as follows:

H > Pada menjalankan kuasa-kuasa yang diberikan kepadanya oleh subseksyen (1) Seksyen 3 Ordinan Pengambilan Tanah, Yang di-Pertua Negeri dengan ini mengisytiharkan bahawa pada pendapatnya tanah yang dinyatakan dalam Jadual bersamaan dengan ini hendaklah diambil bagi maksud awam, *iaitu untuk tapak Skim Penempatan Semula di Kawang, Daerah Papar*.

I (Emphasis added.)

[5] On 28 February 1997 the second defendant registered the acquisition on the land registry copy of the title deed to enable the second defendant to cancel the title deed of the said land.

[6] By letter dated 21 March 2001, the plaintiff requested for the return of the said land for a consideration sum of RM1m on the ground that it was still not developed despite a lapse of 31 years since the acquisition in 1979.

[7] On 21 June 2004 the second defendant sent a report to the Setiausaha Hasil Bumi on the proposed development of the said land. Apparently the State Government has now identified the said land as the site for 'Taman Kekal Pengeluaran Makanan'. The plaintiff was then duly informed of the State Government's refusal to return the land to the plaintiff.

RELIEFS SOUGHT

[8] The reliefs sought by the plaintiff are the following:

(a) A declaration that the purported purchase of the said land by private treaty was ultra vires s 6(2) of the LAO and thus null and void and that therefore the plaintiff is entitled to take repossession of the said land by paying or refunding to the first defendant the sum of RM1m without interest;

(b) A declaration that the defendants' purported acquisition of the said land was mala fide and/or ultra vires ss 3 and/or 7 of the LAO or art 13 of the Federal Constitution and thus at all material times the said land was and still is the plaintiff's lawful property;

(c) A declaration that the said land was not required for a public purpose and/or since the defendants had alienated part of it to a third party, the plaintiff has reasonable expectation to repurchase it back at RM1m for public purposes development as provided under s 2 of the LAO; and

(d) Further or in the alternative, a declaration that the said land was acquired by the defendants negligently and/or in breach of their statutory duties and therefore the defendants are liable to pay the plaintiff general damages in respect thereof.

ISSUES TO BE TRIED

[9] The parties had come up with the following agreed issues to be tried:

(a) Whether the compulsory acquisition of the said land was ultra vires s 3 of the LAO and/or art 13 of the Federal Constitution;

(b) Whether the defendants by acquiring the said land had acted mala fide by not putting to use the said land for the specified purpose it was acquired;

(c) Whether the plaintiff is still the owner of the said land and if not, whether the plaintiff is entitled to take possession of the said land by paying or refunding to the defendants the sum of RM1m without interest; and

(d) In that event, whether the defendants are liable to pay the plaintiff further compensation and/or damages.

[10] No witnesses were called by either side as it was agreed between the parties that they would be relying entirely on the documentary evidence produced before the court. The reason for this course of action is that the issues to be tried are pure points of law and that it was not necessary to call any witness to testify as to facts.

FIRST ISSUE

Whether the compulsory acquisition of the said land was ultra vires s 3 of the LAO and/or art 13 of the Federal Constitution

[11] Article 13(1) of the Federal Constitution provides that 'No person shall be deprived of property save in accordance with law'. There is no dispute that the plaintiff was compulsorily deprived of the said land by way of private treaty pursuant to sub-s 3(5) of the LAO which provides:

> (5) Nothing in this Ordinance shall be deemed to prevent the acquisition of lands for public purposes and the settlement of any compensation therefor by private treaty.

[12] The question that calls for consideration is whether the purported acquisition of the land in 1979 and the declaration in the *Gazette* in 1996 contravened s 3 of the LAO and therefore ultra vires art 13(1) of the Federal Constitution. The plaintiff's contention is that the acquisition was unlawful as the agreement between the plaintiff and the State Government was never approved by the Yang di-Pertua Negeri as required by sub-s 6(2) of the LAO. Subsection 6(2) of the LAO provides as follows:

> (2) It shall not be necessary for the authorized officer to await the publication of the declaration before he endeavours to ascertain from the owner the term and condition on which he is willing to sell his land, *but no negotiations or agreement shall be deemed to be concluded unless and until the conditions of sale and acquisition have been approved by the Yang di-Pertua Negeri*.

(Emphasis added.)

[13] In the present case it is not disputed that the conditions of sale and acquisition of the said land had not been approved by the Yang di-Pertua Negeri when the acquisition was gazetted on 19 December 1996 and 26 December 1996.

[14] Subsection 6(2) of the LAO is clear and unambiguous. It means what it says. Thus, in the absence of approval by the Yang di-Pertua Negeri of the conditions of sale and acquisition no concluded agreement had in fact been reached between the plaintiff and the State Government in respect of the said land. The State Government had no discretion to bypass this statutory requirement. In *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81; [1999] 2 CLJ 997 the Federal Court in dealing with the effect of a breach of a statutory provision said at p 101 (MLJ); p 1016 (CLJ):

> It is well settled that at common law, a contract or transaction in breach of a statutory prohibition and an associated contract is, in general, void for illegality even though the statute is silent as to its consequence and merely inflicts a penalty on the wrong doers (See *Menaka v Lum Kum Chum* [1977] 1 MLJ 91 at p 94; *Phoenix Insurance v Adams (ibid)* but this is subject only to any contrary intention manifested by the statute (see *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*.

[15] There is no contrary intention manifested by sub-s 6(2) of the LAO. Therefore the State Government's failure to comply with the statutory requirement renders the agreement void for illegality. This answers the submission of learned state counsel that a valid contract had been concluded between the plaintiff and the State Government based on the conduct of the plaintiff in accepting the compensation sum of RM1m. On the question of estoppel by conduct the Federal Court in *Lori (M) Bhd* made the following observations at p 95 (MLJ); p 1011 (CLJ):

> The case of *Re a Bankruptcy Notice* (1924) 2 Ch D 76 at p 96 (per Atkin LJ) shows that there is, in most cases, no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction on which he is being sued, despite the fact that by conduct or other means he would otherwise be bound by estoppels. This point is fully discussed in the Privy Council case of *Kok Hoong v Leong Cheong Mines Ltd* [1964] 1 All ER 300 (per Viscount Radcliffe especially at pp 307–309C). The case of *Kan Yeow Wing v Keng Soon Motor Finance Co* [1962] MLJ 391 (per HT Ong J at p 394B) can be seen as an application of this principle.

[16] The gap of 17 years between the acquisition and the *Gazette* notification is relevant in determining whether the acquisition process had in fact been completed. If the acquisition was duly completed in 1979 as claimed by the defendants why then did the State Government have to wait until 1996 to *Gazette* the acquisition? 17 years by any measure of time is far too long to carry out such a simple process. The only conclusion that can be drawn is that the acquisition was incomplete. In this regard the Privy Council decision in *Pemungut Hasil Tanah Daerah Barat Daya, Penang v Kam Gin Paik & Ors* [1986] 1 MLJ 362 is relevant. In delivering the judgment of the Council Lord

Keith of Kinkel quoted with approval the following speech by Upjohn LJ in *Simpsons Motor Sales (London) Ltd v Hendon Corporation (No 1)* [1963] Ch 57 at p 82:

> If the acquiring authority do not proceed within a reasonable time to acquire the property and pay the compensation, they may well lose their rights to enforce the notice. It would be most unreasonable to permit an acquiring authority, having given notice to treat, to sit on their rights and defer enforcement of the notice until it suits them.

[17] The speech illustrates the need for the authority to act with due diligence and within a reasonable time. In *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 1 MLJ 35 (FC) a decision which the Privy Council in the above mentioned case affirmed, Salleh Abbas CJ (Malaya) (as he then was) said that proceedings for acquisition of land under the Land Acquisition Act 1960 ('the LAA') are meant to be a continuous motion. This is what His Lordship said:

> It is true that s 10 of the Act does not prescribe the time within which the inquiry into the compensation must be held but looking at the Act as a whole no one could deny that the proceedings under the Act are meant to be a continuous motion so that no such interruption or such undue delay or stoppage as to amount to an abandonment of the acquisition could be regarded as within this motion. Under s 38 of the Interpretation and General Clauses Ordinance 1948 it is provided that:
>
> Where no time is prescribed or allowed within which anything shall be done, such thing shall be done with all *convenient speed* and as often as the prescribed occasion arises.
>
> (Emphasis added.)
>
> What then is the 'convenient speed'? In our view it must be 'as soon as possible' or 'within a reasonable time', and not 'as late as possible'. Obviously what amounts to 'convenient speed' must vary from case to case and in our judgment seven years delay is certainly not a 'convenient speed' as it is far outside the normal period of time that no reasonable authority could ever regard as reasonable. That being the case the court is entitled to strike down the impugned acquisition proceedings as illegal (*Regina v St Albans Crown Court Ex-parte Cinnamond* [1981] QB 480; and *Regina v Tottenham Justices Ex-parte Dwarkados Joshi* [1982] 1 WLR 631).

[18] The undue, inordinate and unexplained delay of 17 years by the State Government to *Gazette* the acquisition speaks volumes of its real intention in acquiring the said land. I shall touch more on this when dealing with the second issue to be tried. Under sub-s 3(2) of the LAO it was mandatory for the defendants to publish in two issues of the *Gazette* and to serve on the plaintiff

copies of the declaration. In addition to that the defendants were required to issue the notice of acquisition under sub-s 7(1) read with sub-s 7(3) of the LAO. Neither of these had been done.

[19] As a side issue it was argued by learned state counsel that the private treaty was not a government contract and that therefore sub-s 3(1) of the Government Contracts Act 1949 ('the GCA') has no application. This was in response to the plaintiff's argument that the requirements of sub-s 3(1) of the GCA had not been complied with. Subsection 3(1) of the GCA provides as follows:

> 3(1) All contracts made in Malaysia on behalf of a State Government shall, if reduced in writing, be made in the name of the government of that state, and may be signed by the Chief Minister of the state, or by any public officer duly authorised in writing by the Chief Minister, either specially in any particular case, or generally for all contracts below a certain value in his department or otherwise as may be specified in the authorisation.

[20] The short answer to this argument is that it does not matter because an unenforceable contract, be it government contract or otherwise is void: see s 2(g) of the Contracts Act 1950.

[21] Since the acquisition of the said land was not done in accordance with the LAO it contravened art 13(1) of the Federal Constitution. Consequently the acquisition of the said land in 1979 was unlawful. The first issue to be tried must therefore be answered in favour of the plaintiff.

SECOND ISSUE

Whether the defendants by acquiring the said land had acted mala fide by not putting to use the said land for the specified purpose it was acquired

[22] The plaintiff's contention is that the defendants had acted in bad faith in purporting to acquire the said land urgently by private treaty and in the name of public purpose when in fact it was not needed for a public purpose at all. There is no dispute that the said land was never used for the specified purpose it was acquired, namely for 'Skim Penempatan Semula di Kawang, Daerah Papar'.

[23] As a follow up to the private treaty in 1979 the second defendant issued the following letter to the *Pengurus Besar*, Koperasi Pembangunan Desa. The letter reads:

24hb Januari, 1980

Pengurus Besar,

Koperasi Pembangunan Desa,

Komplex SEDCO.,

Kota Kinabalu.

Kawang Estate

You are hereby informed that the whole of P.L. 1312 (1391.35 acres) has been surrendered to Government.

2. You can with immediate effect enter the land to carry out the projects for which this land was acquired.

BERKHIDMAT UNTUK NEGARA

Sgd.

(Bernard G. Dompok)

Juru Nilai

b.p. Pengarah Tanah dan Ukur

[24] Judging from the tone of the letter it is obvious that the project was to be carried out immediately. Yet, until today, more than 30 years after the letter was issued the project has yet to take off the ground. Now the State Government says the said land is earmarked for 'Taman Kekal Pengeluaran Makanan' and this too after the plaintiff asked for its return. In the report prepared by the second defendant dated 21 June 2004 (p 54 of encl 46) the second defendant candidly admitted that the said land was not used for the purpose it was acquired. The relevant part of the report reads:

> Sejak pengambilan balik tanah PL.1312, kawasan tersebut tidak ada dibangunkan sesuai dengan tujuan pengambilannya iaitu untuk penempatan semula di Kawang, Papar. Hanya pada tahun 2001, kawasan bekas estet Kawang telah dikenalpasti oleh Jabatan Pertanian untuk dijadikan sebagai Taman Kekal Pengeluaran Makanan (TKPM).

[25] In my judgment the State Government's failure to implement the 'Skim Penempatan Semula di Kawang, Daerah Papar' until today is evidence of mala fide on its part. It is clear that the State Government has no intention to put the said land to use for the purpose it was acquired in 1979.

[26] Learned state counsel strenuously argued that the declaration made pursuant to sub-s 3(1) of the LAO is conclusive proof that the said land was acquired for a public purpose and that therefore the plaintiff's claim is

misconceived. With due respect to learned state counsel she is missing the point. The issue is not whether the acquisition was or was not for a public purpose. The issue is whether the State Government had acted in bad faith. Clearly by virtue of sub-s 3(1) of the LAO when the State Government declares that the acquisition of any land is for a public purpose then the acquisition is deemed to be for a public purpose. Subsection 3(1) of the LAO is reproduced below:

> If the Yang di-Pertua Negeri considers that any land should be acquired for a public purpose he may cause a declaration to that effect to be made in the manner provided by this section and *the declaration shall be conclusive evidence that the land to which it relates is required for a public purpose*.

(Emphasis added.)

[27] This does not mean however that the exercise of the discretion is beyond reproach. In *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 the Federal Court, relying on the Privy Council decision in *Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v Government of the State of Johore* [1979] 1 MLJ 49 held that the purpose of the compulsory acquisition can be questioned, but only if it can be shown that the acquiring authority has misconstrued its statutory powers or if bad faith is established.

[28] It is trite law that discretionary powers are to be exercised properly and in good faith. In *Pengarah Tanah dan Galian, Wilayah Persekutuan (in this case the appellant in the appeal was the land executive committee, and not, as stated in the appeal record, the Pengarah Tanah dan Galian however, the parties made nothing of this, presumably because the government agree that whoever is cited as appellant the government will be bound if the appellant loses — mng ed mlj) v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 Raja Azlan Shah CJ (as His Majesty then was) when speaking of the exercise of discretion said at p 148:

> In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.

[29] The question is whether, having acquired the said land for a public purpose (assuming for a moment that the acquisition was lawful) the State Government is free to use it for a purpose other than the gazetted purpose, namely 'Skim Penempatan Semula di Kawang, Daerah Papar'. I would think

not. The spirit of the LAO is to allow the State Government to acquire lands for specific public purposes. It does not give the State Government carte blanche to deal with the acquired lands in any manner it deems fit post acquisition. If for instance a piece of land was acquired for building a hospital it cannot be used as a dump site.

[30] There is nothing in the LAO to confer on the State Government an unfettered discretion to deal with the land in any way it likes after acquisition. This in fact will be contrary to sub-s 3(2)(d) of the LAO which makes it mandatory for the State Government to specify in the declaration the purpose of the acquisition. The legislature, it is often said does not legislate in vain. The mandatory requirement under sub-s 3(2)(d) of the LAO reflects the legislative intent, which is to allow acquisition for specific public purposes only. Governments come and go and policies change but unless and until the *Gazette* notification is revoked the land must be used for the purpose it was acquired. Whether the government can revoke the notification and if so under what circumstances it can do so is a question that has to be argued some other time.

[31] To allow the government to change the land use at its whim after the acquisition, even for a public purpose is not only illegal but unjust to the land owner because when he negotiated for compensation it was on the understanding that his land was to be used for a particular public purpose, not any public purpose. The wide powers of the government to compel private individuals to give up their lands, albeit with compensation must not only be exercised in good faith but must manifestly be seen to be exercised in good faith. Land owners must be protected against compulsory deprivation of their properties for some oblique motive disguised as 'public purpose'. The possibility of this happening cannot be discounted as the State Government in the present case in fact tried to alienate the said land to a third party in 1996 as can be seen from the document at p 2 of encl 47.

[32] For the foregoing reasons I am constrained to hold that mala fide has been established against the State Government. The answer to the second issue must therefore be in favour of the plaintiff as well.

THIRD ISSUE

Whether the plaintiff is still the owner of the said land and if not, whether the plaintiff is entitled to take possession of the said land by paying or refunding to the defendants the sum of RM1m without interest

[33] Having regard to my findings on the first and second issues the obvious answer to this question is yes because if the acquisition was unlawful for contravening art 13(1) of the Federal Constitution, the said land has not legally

passed hand to the State Government. The acquisition being void and of no effect the plaintiff is still the legal owner of the said land, notwithstanding the fact that the title deed to the land had been surrendered to the defendants.

[34] In *Hong Lee Trading & Construction Sdn Bhd v Taut Ying Realty Sdn Bhd* [1991] 1 MLJ 250 it was held by Lamin J (as he then was) that by virtue of sub-s 8(1) of the LAA which is in pari materia with sub-s 3(3) of the LAO the actual acquisition takes place at the time or soon after the declaration has been gazetted and the land owner is duly served with the notice of the decision to acquire.

[35] In *Singapore Woodcraft Manufacturing Co (Pte) Ltd v Mok Ah Sai* [1979] 2 MLJ 166 it was held that only upon serving the relevant statutory notice on the owners that all interest in the land comes to an end and the land becomes vested absolutely in the state authority free from encumbrances. As mentioned earlier in this judgment the defendants failed to comply with the mandatory requirements of sub-s 3(2) and sub-s 7(1) read with sub-s 7(3) of the LAO.

[36] There is therefore no merit in learned state counsel's contention that the surrendering of the title deed was a mere formality and that the said land had passed to the State Government free from pre-existing legal impediments.

FOURTH ISSUE

In that event, whether the defendants are liable to pay the plaintiff further compensation and/or damages

[37] This issue is inconsequential in the light of my finding on the third issue.

CONCLUSION

[38] For the reasons stated above I am satisfied that the plaintiff is entitled to the reliefs sought. Consequently the plaintiff's claim was allowed in terms of the statement of claim dated 27 June 2008. Costs of the proceeding to be borne by the defendants, to be taxed unless otherwise agreed.

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed